

1 Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
2 Jennifer S. Stoughton, No. 238309
CARROLL, BURDICK & McDONOUGH LLP
3 Attorneys at Law
44 Montgomery Street, Suite 400
4 San Francisco, CA 94104
Telephone: 415.989.5900
5 Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
6 jyank@cbmlaw.com
jstoughton@cbmlaw.com

7
8 Attorneys for Proposed Relator
San Jose Police Officers' Association

9 BEFORE THE ATTORNEY GENERAL
10 OF THE STATE OF CALIFORNIA

11 SAN JOSE POLICE OFFICERS'
12 ASSOCIATION,

13 Plaintiff-Relator,

14 v.

15 CITY OF SAN JOSE, and CITY OF
16 SAN JOSE CITY COUNCIL,

17 Defendants.

Opinion No. 12-605

**REPLY IN SUPPORT OF SAN JOSE POLICE
OFFICERS' ASSOCIATION'S APPLICATION
FOR LEAVE TO SUE IN *QUO WARRANTO***

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1 **I. INTRODUCTION**

2 Notwithstanding its length, the City's Opposition fails to address the primary
3 question before the Attorney General. The City strenuously, but erroneously, focuses on
4 the merits of the dispute between the parties, contending that on the limited record
5 presented it complied with all of its statutory bargaining obligations. But the Attorney
6 General "do[es] not attempt to resolve the merits of the controversy" in deciding whether
7 to grant the POA's application. (*Bakersfield Police Officers' Association*, 2012 WL
8 2184570, at *2 (June 11, 2012) ("*Bakersfield POA*").) Instead, she "decide[s] whether the
9 application presents a substantial issue of fact or law that warrants judicial resolution."
10 (*Id.*) The application turns then on the "substantiality" of the legal dispute presented.
11 Being right on the merits—as Defendant asserts it is—has no bearing on whether the
12 dispute is a "substantial issue of fact or law that warrants judicial resolution." (*Id.*)

13 As expected (and like *Bakersfield POA*), the City "draw[s] materially different
14 inferences and legal conclusions" from the verified facts presented. But in doing so, the
15 Opposition unwittingly highlights at least two substantial questions of whether local meet-
16 and-confer requirements were satisfied:

- 17 1. Whereas SJPOA contends that the parties never in fact reached impasse
18 (SJPOA MPA at pg. 8), the gist of the City's argument is that the
19 parties' prospectively stipulated, through their "Framework" or ground
20 rules, to reaching a state of impasse by October 31, 2011, such that any
21 meet-and-confer obligation would expire on that date, regardless of the
22 state of negotiations. (Opp. at pgs. 2-3.) Effectively, the City is arguing
23 that the SJPOA waived the right to bargain after October 31, a
24 contention factually and legally contested by the SJPOA.
- 25 2. And whereas the SJPOA contends that multiple subsequent
26 concessionary proposals by both sides, or changed financial
27 circumstances, or a combination of the two, broke any ostensible
28 impasse (SJPOA MPA at pg. 8), the City argues that impasse was never

1 broken after October 31, 2011, such that its bargaining obligation was
2 never renewed. (Opp. at pg. 3.)

3 The parties clearly have sharply different views of the City's bargaining
4 obligations under the largely undisputed facts. And as the Attorney General confirmed
5 only last month in *Bakersfield POA*, "a quo warranto action is the appropriate legal
6 proceeding in which to resolve ... whether state and local meet-and-confer requirements
7 were satisfied." (*Id.* at *5.)

8 The City addresses the second prong of the test—whether granting the
9 application would serve the public interest—but its arguments are weak, particularly in
10 light of *Bakersfield*, which it tries to distinguish, again improperly, on the merits of that
11 case. (See Opp. at pgs. 14-15 arguing that the issue in *Bakersfield POA* – i.e., was
12 whether the city's failure to have a single meet and confer violated the MMBA – is
13 different from the City's failure to meet and confer over its February 22, 2012 proposed
14 ballot measure.) *Bakersfield POA* reaffirms, particularly given the recent trend of
15 California public agencies going directly to the voters to change employee benefits, that it
16 serves the public interest to clarify a public entity's obligation to bargain before it may
17 submit a ballot measure to its citizens, when the measure would impact matters without
18 the scope of bargaining.

19 II. LEGAL ARGUMENT

20 A. The Parties' Competing Views of Whether the City Met Its Statutory 21 Bargaining Obligations Present Substantial Issues of Fact or Law 22 That Warrant Judicial Resolution.

23 The City agrees with the SJPOA that *quo warranto* may be an appropriate
24 process to invoke in order to resolve legal challenges to the adoption of a Charter
25 provision. (Opp. at pg. 6.) It also (1) does not contest the SJPOA's position that a charter
26 city must comply with the MMBA before proposing a ballot measure to amend its charter
27 (*Bakersfield POA* at *2), and (2) accepts that Measure B was designed to effectuate
28 changes to "wages, hours, and other conditions of employment," to which the obligation
to meet and confer attaches under both the MMBA and the San Jose Charter. (*Id.* at *5.)

1 In *Bakersfield POA*, upon concluding that the subject matter presented was
2 broadly within the City of Bakersfield's obligation to meet and confer, the Attorney
3 General concluded "that a quo warranto action is the appropriate legal proceeding in
4 which to resolve this issue." (*Id.* at *5.) She did not determine whether, when the matter
5 was fully litigated in superior court proceeding, the union or the city would prevail.
6 Extensive analysis of the merits is not appropriate since the Attorney General "do[es] not
7 attempt to resolve the merits of the controversy," in deciding whether to grant the POA's
8 application. (*Id.* at *2.)¹ Whether the POA or the City ultimately prevails in Bakersfield
9 or San Jose, "[w]hether [a charter] amendment is valid or not presents substantial
10 questions of fact and law with respect to the actions of the parties in complying with the
11 provisions of the MMBA." (76 Ops. Cal. Atty. Gen. 169, 172.)

12 This analysis comports with judicial precedent holding that the role of the
13 Attorney General or her designee is "to determine whether the documents and evidence
14 presented to h[er] are in proper legal form and *prima facie* sufficient, and, if they are, it is
15 h[er] duty to sign the petition and present it to the court." (*Int'l Assoc. of Firefighters v.*
16 *City of Oakland* (1985) 174 Cal.App.3d 687, 697.) Here, although the factual background
17 is somewhat different than the facts in *Bakersfield POA*, the underlying legal questions are
18 similar (if not identical), and, like in *Bakersfield POA*, a "quo warranto action is the
19 appropriate legal proceeding in which to resolve" the competing legal claims of the
20 SJPOA and the City of San Jose. (*Bakersfield POA* at *5.)

21 **B. *Bakersfield POA* Demonstrates That Litigating Disputes About**
22 **Whether Public Agencies Have Met Their Bargaining Obligations in**
23 **Enacting Pension Measures Serve the Public Interest.**

24 *Bakersfield POA* concluded that "it would therefore serve the public interest"
25 to allow litigation to proceed in a dispute over whether a city had satisfied its bargaining

26 ¹ The City's lengthy protestations that it satisfied its bargaining obligation are premature
27 and irrelevant. (Opp. at pgs. 1, 3, 8, 9-10.) Having forth a *prima facie* case that the City
28 violated the MMBA, SJPOA is not required to prove the underlying violation in its
application. Indeed, the City's assertions confirm the underlying legal and factual
disputes concerning the procedural validity of Measure B.

1 prior to presenting a pension measure to city voters. (*Id.* at *5.) The San Jose dispute is
2 no different and deserves “proper adjudication” in the superior court.

3 The SJPOA’s application explained the Attorney General’s precedent of
4 recognizing that resolving legal disputes about public agency bargaining obligations over
5 charter measures serves the public interest. (SJPOA MPA at 11 [citing 76 Ops. Cal. Atty.
6 Gen. 169, 172—discussing *Seal Beach*] and June 11, 2012 Attorney General Decision No.
7 11-702 [*Bakersfield POA*].) In opposition, the City argues that (1) (curiously) litigating
8 this dispute would discourage public entities from bargaining in good faith, (2) litigation
9 of the dispute would divest voters of their “plenary” authority to establish employee
10 benefits (Opp. at pg. 11), and (3) the proposed *quo warranto* action would be
11 unnecessarily duplicative. Each argument can be easily rejected.

12
13 **1. Granting Leave to Sue in *Quo Warranto* Will Effectuate
the Public Policies Underlying the MMBA.**

14 The City argues that permitting a *quo warranto* action would harm the public
15 interest because “a public employer reaching impasse with a union after extensive
16 bargaining about a ballot measure will be precluded from agreeing to further mediation or
17 modifying the ballot proposal to incorporate concessions favoring the employees....”
18 (Opp. at pg. 15.) Again, the City is improperly focused on the merits, when the correct
19 question is whether the public interest is served by *the dispute* proceeding. The City’s
20 argument is that an *ultimate determination* that it should have resumed bargaining because
21 it made a concession (as SJPOA argues) would discourage it and other agencies from
22 making concessions in future negotiations.² But the Attorney General “do[es] not attempt
23 to resolve the merits of the controversy.” (*Bakersfield POA* at *2.) The City can restate
24 its policy argument in the superior court, but it only underlines that the dispute is
25 appropriate for *quo warranto* determination.

26
27 ² This is a dubious proposition in the first place, since the City’s existing obligation to
28 bargain in good faith may warrant it making such concessions. It also assumes the SJPOA
will prevail on the merits, which may not be presumed at this juncture.

1 **2. The SJPOA Has Demonstrated That an Action in *Quo***
2 ***Warranto* Will Serve the Public Interest by Clarifying the**
3 **MMBA Bargaining Obligation and Delineating When and**
4 **by What Means a Charter Municipality May Seek to**
5 **Reduce Contractual Pension Benefits.**

6 The City does not appear to dispute the proposition that it is in the public
7 interest to invalidate a charter amendment when its enactment violated the MMBA.
8 Instead, the City argues that allowing the SJPOA to proceed with its claims in *quo*
9 *warranto* would divest the San Jose electorate of what it characterizes as “plenary”
10 authority over city employee benefits. But this argument not only assumes that the
11 SJPOA will prevail on the merits under the MMBA (contrary to the City’s argument that
12 the SJPOA’s claims fail as a matter of law), but it also assumes that the citizenry has such
13 “plenary” authority, which is belied by the very existence of the MMBA and decades of
14 case law construing that statute.

15 The City’s own apparent confusion over its obligations and the rights of its
16 citizens demonstrates the need for judicial clarification, and the *quo warranto* action the
17 SJPOA seeks to pursue will seek determination of these important issues. Indeed, the
18 rights of hundreds of thousands of municipal employees throughout California are
19 implicated by a decision on the validity of the City’s actions, as well as the broader public
20 policy served by California’s labor relations statutes. Consequently, the public interest
21 requirement is met.

22 **3. Allowing the SJPOA to Sue in *Quo Warranto* Will Not**
23 **Result in a Multiplicity of Actions.**

24 The City cites six existing legal actions it wrongly claims militate against
25 granting leave to bring this action in *quo warranto*. But it concedes that four of the
26 matters are filed by *other plaintiffs*. Two of those are easily distinguished: the OE Local 3
27 and AFSCME Local 101 unfair labor practice charges filed with the Public Employment
28 Relations Board (“PERB”) involve negotiations to which the SJPOA was not a party.
29 Consequently, they will not vindicate the rights of the SJPOA and its members.
30 Furthermore, simply because other individuals and entities have made challenges to

1 Measure B that may overlap to some degree with SJPOA's challenge should not preclude
2 granting leave to sue in *quo warranto*.

3 The PERB charge filed by Local 230 does at least concern the same bargaining
4 history as the SJPOA (Holtzman Decl. ¶ 9; Opp. at pg. 6.); however, the Legislature has
5 determined that, unlike firefighters, PERB has no jurisdiction over labor disputes
6 involving police officers. (Gov. Code § 3511.) Consequently, the SJPOA cannot advance
7 its claims at PERB.

8 The fifth matter was brought by the SJPOA before Measure B was voted upon
9 by the San Jose electorate, but it is well-established that "once those [municipal charter]
10 provisions have been adopted, their procedural regularity may be attacked *only* in *quo*
11 *warranto* proceedings." (*Int'l Ass'n. of Firefighters, supra*, 174 Cal.App.3d at 694
12 [emphasis added].) Thus, that lawsuit is no longer a vehicle to vindicate the rights of the
13 SJPOA and its members.

14 The final lawsuit addresses the *substantive legality* of specific provisions of
15 Measure B. The only MMBA-related cause of action asserted in that case (which also
16 cannot address the procedural regularity of the passage of Measure B for the reason stated
17 *supra*) asserts that a single provision of Measure B would violate the MMBA by
18 purporting to narrow the scope of bargaining prospectively. Conversely, here the SJPOA
19 seeks to address the *procedural validity* of Measure B, alleging the City has already
20 violated the MMBA in failing to meet and confer over Measure B. These are two separate
21 and distinct issues. Therefore, the underlying issue in the *quo warranto* action will not be
22 decided by the Santa Clara Superior Court action.

23 In summary, granting the SJPOA's Application for Leave to Sue in *Quo*
24 *Warranto* will not result in a multiplicity of related actions. Thus, the City's assertion that
25 it would be against the public interest to grant the application is false.
26
27
28

1 **III. CONCLUSION**

2 Leave to sue in *quo warranto* should be granted to decide whether the City of
3 San Jose sufficiently met and conferred with the San Jose Police Officers' Association
4 before placing an initiative measure on the June 2012 ballot which, after it was passed by
5 the electorate, resulted in the enactment of city charter provisions that dramatically change
6 retirement benefits for current and future employees of the City.

7 Dated: July 16, 2012

8 CARROLL, BURDICK & McDONOUGH LLP

9
10 By _____

11 Gregg McLean Adam
12 Jonathan Yank
13 Jennifer Stoughton
14 Attorneys for Proposed Relator
15 San Jose Police Officers' Association

1 *San Jose Police Officers' Association v. City of San Jose, et al.*
2 Before the Attorney General of the State of California, Opinion No. 12-605

3 **PROOF OF SERVICE BY UPS – NEXT DAY AIR**

4 I declare that I am employed in the County of San Francisco, California. I am
5 over the age of eighteen years and not a party to the within cause; my business address is
6 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On July 16, 2012, I served
7 the enclosed:

8 **REPLY IN SUPPORT OF SAN JOSE POLICE OFFICERS' ASSOCIATION'S APPLICATION**
9 **FOR LEAVE TO SUE IN *QUO WARRANTO***

10 on the parties in said cause by causing the same to be sent via **UPS-Next Day Air** on the
11 parties listed below:

12 Jonathan V. Holtzman, Esq.
13 Randy Riddle, Esq.
14 David Kahn, Esq.
15 Renne Sloan Holtzman & Sakai LLP
16 350 Sansome Street
17 Suite 300
18 San Francisco, CA 94104
19 (415) 678-3800

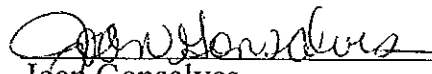
Attorney for Defendant/Respondent
CITY OF SAN JOSE

20 City of San Jose
21 Office of the City Attorney
22 200 East Santa Clara Street
23 16th Floor
24 San Jose, CA 95113

Attorney for Defendant/Respondent CITY
OF SAN JOSE CITY COUNCIL

25 Marc J. Nolan, Deputy Attorney General
26 300 South Spring Street, Suite 1701
27 Los Angeles, Ca 90013
28 (213) 897-2255

I declare under penalty of perjury that the foregoing is true and correct, and
that this declaration was executed on July 16, 2012, at San Francisco, California.


Joan Gonsalves